

June 27, 2013

VIA ELECTRONIC FILING

Honorable Judge Pamela K. Chen
United States District Court Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

RE: Phoenix Beverages, Inc. et al. v. Exxon Mobil Corp. et al.
Case No. 1:12-cv-03771-PKC-JO

Dear Judge Chen:

Pursuant to Your Honor's Rule 3, Plaintiffs Phoenix Beverages, Inc., RODB LLC, Windmill Distributing Company, L.P., Up from the Ashes, Inc., and other affiliated companies (collectively, "Plaintiffs"), hereby request a pre-motion conference to address the summary judgment motion that Plaintiffs intend to file against Defendants ExxonMobil Research & Engineering ("ER&E"), Exxon Mobil Corporation ("Exxon") and Quanta Resources Corporation ("Quanta"), which will establish the liability of Defendants for the Plaintiffs' costs of response to contamination emanating from the Quanta Resources Site adjacent to the Plaintiffs' property on Review Avenue in Long Island City. Plaintiffs can establish Defendants' liability as a matter of law under the strict liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") through publicly available documents, including admissions these parties have made in other litigation.

As background to this matter, in 1987, ER&E defended itself against claims that wastes from its Linden, New Jersey research facility were illegally disposed of in New York City's landfills by arguing ER&E's "slop oil was *always* delivered to the . . . re-refinery located at 37-80 Review Avenue in Long Island City, New York." See Memorandum of ER&E in Support of Motion for Summary Judgment in *City of New York v. Exxon*, Case No. 85 Civ. 1939 (EW) (S.D.N.Y.), Docket No. 767 at 7 (emphasis added).¹ 37-80 Review Avenue (the "Quanta Site"), is the property adjacent to Plaintiffs' property at 37-88 Review Avenue (the "Phoenix Property"), from which the contamination at issue in this case is migrating.

Exxon is liable as a generator of the hazardous substances that now contaminate the Phoenix Property. Numerous contract documents, invoices and waste receipts – all bearing Exxon Corporation's insignia – together with deposition testimony and discovery responses, including responses to Requests for Admissions, from other litigation prove Exxon arranged for

¹ ER&E's legal memorandum, and the supporting affidavits, shipping records and other documentation submitted by ER&E's attorneys, will be provided to the Court in Plaintiffs' motion for summary judgment.

the disposal of hazardous substances at the Quanta Site. This overwhelming evidence establishes that millions of gallons of waste oil, slop oil, and other hazardous substances were sent from various Exxon facilities to the Quanta Site and, as such, Exxon is jointly and severally responsible for Plaintiffs' responses costs.

Quanta is a prior owner of the Quanta Site, and processed waste oil there until October 1981, when Quanta filed for bankruptcy. *Midlantic Nat. Bank v. New Jersey Dept. of Env'tl. Prot.*, 474 U.S. 494, 496-97 (1986). As part of the bankruptcy, Quanta abandoned the Quanta Site, where Quanta had "accepted and stored . . . over 70,000 gallons of toxic, PCB-contaminated oil in deteriorating and leaking containers." *Id.* at 497. As a result of the abandonment, "[i]t became necessary for New York to decontaminate the facility, with the exception of the polluted subsoil." *Id.* at 498. Ultimately, the United States Supreme Court held that a debtor "may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety," and reversed the abandonment of the Quanta Site. *Id.* at 507. Relying on publicly available documents, Plaintiffs can establish the elements for summary judgment on their CERCLA claim against the Defendants, *see B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992), and accordingly request leave to file their motion to expeditiously resolve this claim.

Recent environmental sampling shows widespread contamination with waste oil migrating from the Quanta Site and an associated threat of explosive and toxic vapors. See attached May 22, 2013 LNAPL Monitoring Well Sampling Oversight Report by Apex Companies, LLC ("Apex Report"), wherein it is determined that between 2 feet and over 5 feet of LNAPL (light non-aqueous phase liquid), or commonly called "waste oil" from the Quanta Site is present on the Phoenix Property with an LEL (Lower Explosive Limit) of 100%. The Apex Report observes,

It should be noted that the 100% LEL reading is a significant concern because it indicates that the vapors above the liquid in the well are potentially explosive in nature. In addition, the vapors above the LNAPL in the well may also be representative of sub-slab vapors in the vicinity of the well sampled.

Apex Report at 2.

Based on this new data, the extent of Quanta-sourced contamination on the Phoenix Property presents a significant risk for tenants and visitors at the Property, and continues to greatly impair the Property's uses and value. This makes the need for a pre-motion conference for the Plaintiffs' partial summary judgment motion under CERCLA pressing, as Plaintiffs continue to incur costs of response and will likely incur substantial additional costs to address the present risks from the Quanta-sourced contamination. While there are some response actions planned at the Quanta Site under the New York Brownfields Program, these actions do not adequately address the ongoing threat to the Phoenix Property resulting from the Quanta-sourced contamination.

Undersigned Plaintiffs' counsel has briefed Magistrate Judge Orenstein regarding the recent sampling results, at the status conference on June 6, 2013, and Judge Orenstein is aware of

this situation and this request by Plaintiffs. We are requesting a pre-motion conference at the Court's earliest convenience.

Very truly yours,
Hunsucker Goodstein PC



Michael D. Goodstein

Enclosures

cc:

Honorable Magistrate Judge James Orenstein
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